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No. 2375.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL ELECTRIC COMPANY, a corporation, *Petitioner*,

vs.

C. A. BROWER, Trustee in Bankruptcy of the Estate of ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, a corporation, Bankrupt, *Respondent.*

IN THE MATTER OF ANDRUS-CUSHING LIGHTING FIXTURE COMPANY, A CORPORATION, BANKRUPT.

PETITION FOR REVISION

RESPONDENT'S BRIEF

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MOTION FOR DISMISSAL.

Comes now the respondent in the above entitled action, C. A. Brower, Trustee in Bankruptcy of the estate of Andrus-Cushing Lighting Fixture Company, a corporation, Bankrupt, and moves the

Court to dismiss the petition for revision in the above entitled action upon the following grounds, to-wit:

I.

That the petitioner's remedy to review the order of the United States District Court for the Western District of Washington is by appeal and not by petition to revise.

II.

That the petition for revision in the above entitled action was not filed within the time provided by law.

ARGUMENT ON MOTION TO DISMISS

The General Electric Company, a corporation, by its petition filed in the bankruptcy court claimed to be the owner of a lamp stock in the possession of the respondent as trustee in bankruptcy, and prayed that such lamp stock be withheld from sale and delivered to the petitioner. After full hearing this petition was denied. A petition for review of said referee's order was duly presented to the United States District Court for the Western District of Washington, and upon full hearing the order of the referee in bankruptcy was affirmed. From this order affirming the decision of the referee this petition for revision is presented to this Court.

The petitioner's remedy in this case was by appeal, not by petition for review. The only case

in which such a petition to superintend and review can be prosecuted is to review a matter of law in a "proceeding in bankruptcy." The order of the referee in bankruptcy was an order made not in a "proceeding in bankruptcy," but upon a "*controversy arising in a bankruptcy proceeding.*" The petitioner, General Electric Company, was claiming an adverse interest to the trustee in bankruptcy in a certain lamp stock, and the order of the referee in bankruptcy was made upon the assertion of an adverse title and it was therefore clearly a case of a "controversy arising in a bankruptcy proceeding." An appeal would lie from the order of the United States District Court, under Section 24A of the Bankruptcy Act, and a petition to superintend and review would not lie under Section 24B for the reason that the proceedings reviewable under this section are only those administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate which are not made especially appealable under Sections 24A and 25A. This would include questions between the bankrupt and his creditors of an administrative character and exclude such as are appealable under Section 24A, and this section, 24B, does not extend to cases where an order is made upon a controversy between the bankrupt and those claiming adversely to him or his creditors.

In this case the petitioner is claiming title to the goods adversely to the trustee, and it is there-

fore clearly a case of a "controversy arising in the course of bankruptcy proceedings" and reviewable only upon appeal.

In re Martin, 201 Fed. 37.
In re Mueller, 135 Fed. 711, 68 C. C. A. 349.
In re First Nat'l Bank, 135 Fed. 62, 67 C. C. A. 536.
Barnes vs. Pampel, 192 Fed. 525, 113 C. C. A. 81.
Security Warehousing Company vs. Hand, 143 Fed. 32.
Hewitt vs. Berlin Machine Works, 194 United States 296, 24 Supreme Court Rep. 690, 48 Law Edition 986.

The remedies by appeal and by petition for revision are not concurrent optional remedies, but are mutually exclusive, and where a remedy by appeal is given, a petition for revision will not lie.

The petitioner in this case being given a right of appeal by Section 24A of the Bankruptcy Act, it is precluded from filing a petition for revision under Section 24B.

In re Loving, 224 United States 182, 56 Law Ed. 725.
Loveland on Bankruptcy, Second Ed., 809.
Brandenburg on Bankruptcy, Second Ed., 375.
In re Goode, 99 Fed. 389.
In re Ives, 113 Fed. 911.
In re Mueller, 135 Fed. 715.

III.

The petition for revision was not filed within the time allowed by law therefor. The time within which the petition can be filed is limited to ten days, under analogy to Section 25A of the Bankruptcy Act, as Congress intended that this petition for revision should be disposed of promptly, if not summarily.

In re Friend, 134 Fed. 778-780.

ON THE MERITS.

Without waiving our motion to dismiss, but insisting that it is well taken, we will discuss the merits of this case. It has been agreed between counsel that the matter shall be presented to this Court upon the written agreement entered into between the petitioner and the bankrupt and upon the certificate of facts found by the referee in bankruptcy. From this written agreement and from the certificate these facts appeared: The petitioner executed a written agreement with the bankrupt, by the terms of which, although the bankrupt was designated as the agent of the manufacturer, it agreed to many things which were inconsistent with the theory of bailment or with the theory that the title remained vested in the manufacturer, but entirely consistent with the theory that the relation of debtor and creditor was established. It appears from this agreement and from the findings of the referee that the bankrupt as the alleged agent

agreed to pay all the expenses of storage, cartage, transportation, insurance, taxes, delivering and sale of lamps under the agreement, and all expenses incident thereto, and to the payment and collection of accounts thus created. The goods were not kept separate and apart from the other stock of merchandise of the bankrupt, but were sold by it in the regular course of business as all other goods were sold. The money received upon the so-called consigned stock was treated as the money of the bankrupt, the same as any other funds. It was not required to keep the money separate and apart from other money belonging to the bankrupt, nor was it required to turn the money received from such sales over to the manufacturer, but to pay for the lamps so sold monthly, less 29% for making the sales, and in case the bankrupt remitted in full for all the lamps sold during the preceding month, whether it had collected for such lamps or not, it was to receive an additional 5% commission. It further appears from the certificate of the referee that the petitioner had a warehouse or depot in the City of Tacoma for storing lamps which unquestionably belonged to it, and from this depot it supplied lamps to the bankrupt as ordered or required, the same as to any other retail dealers. It is apparent from the certificate of facts found that the manufacturer treated the lamps *in this storage warehouse* as its property and delivered to the bankrupt goods from this point which it expected the bankrupt to take and pay for either at once or

as the goods were sold, and it is apparent that it never expected to take back these goods.

It further appears that the agent of the petitioner in Tacoma was S. D. Ackroyd, who at the same time was the secretary of the bankrupt corporation, and the purpose of this agreement was not to have two agents in Tacoma, one S. D. Ackroyd and the other the bankrupt corporation, but that the only real agent was to be Ackroyd, and that the purpose and object of the execution of this alleged agency agreement with the bankrupt was to enable the manufacturer to control the output of his mills and the disposition of his products and to fix the price at which the goods would be sold.

The agreement provided that the same may be terminated in the event that the Andrus-Cushing Lighting Fixture Company became insolvent. The agent of the manufacturer, Ackroyd, knew that the Andrus-Cushing Fixture Company had become insolvent, knew that the salaries of the employes were in arrears for a long period; that his own salary as secretary had not been paid, and that the other indebtedness against the bankrupt, amounting to a large sum, was long past due and unpaid, and this knowledge of the petitioner's agent was sufficient to charge it with notice of the situation, and yet the petitioner took no steps to terminate the contract. Under these facts we insist that a sale of the goods had been made to the bankrupt, and if it is to be treated as a conditional sale it was void as to creditors because not recorded within ten days after

its execution, as provided by the laws of the State of Washington.

Where goods are delivered to the seller by the manufacturer and he is allowed to place them with his stock of goods, sell and dispose of them in the ordinary course of business, handles, manages and controls them as other goods, pays the insurance, taxes, cartage, warehouse charges, and all other expenses in connection therewith, sells and disposes of said goods in the ordinary course of business and agrees to pay for such goods so disposed of, and there is neither any agreement to return the goods nor an agreement to account for the proceeds of the sales of goods as such, there is no bailment, for the essential element of bailment is lacking.

In support of our contention in this case we cite to the Court:

In re Penny and Anderson, 23 Am. Bankruptcy Rprs. 115.
Troy Wagon Works vs. Vastbinder, 12 Am. Bankruptcy Report 353, 130 Fed. 232.
In re Wood, 15 Am. Bankruptcy Rpr. 411, 140 Fed. 964.
Ludvigh vs. American Woolen Company, 23 Am. Bankruptcy Rpr. 314.
In re Priegle Paint Company, 171 Fed. 586.

We call particular attention to the case *In re Penny and Anderson*, 23 Am. B. R. 115. This case was decided in the U. S. District Court for the

Southern District of New York, in which district the decisions have been almost uniformly the same as the decisions of the courts of our circuit. In the case of *Penny and Anderson* the claimant delivered certain wines and liquors to the bankrupts, which were for consumption or sale in the ordinary course of business. A contract was taken, called a "Memorandum of Consignment," but contained a reservation of title in the vendor until full payment of the purchase price, but was silent as to the disposition of the proceeds of the sale. The goods were stored in the basement of the bankrupt's place of business and were used as required, and the court held that the transaction constituted a sale and that the title to such goods passed to the trustee. The court there said:

> "The transaction in question did not create the relations of principal and factor, for a factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services."
>
> "If it were claimed to be a warehousing contract it would be void against creditors because there was no change of possession, control or otherwise, nor any real separation from other goods belonging to the bankrupts. If it were claimed to be a chattel mortgage it would be void for non-filing as against the trustee. And if it were claimed to be a conditional sale it would be void as against creditors."

In that case the court cited *Re Hassam*, 18 A. B. R. 745, 153 Fed. 932, in which Judge Martin of Vermont said:

> "It has been repeatedly held that when personal property is delivered to a vendee for sale or to be dealt with in any way inconsistent with the ownership of the seller, or so as to destroy his lien or right of property, the transaction cannot be upheld as a conditional sale and is a fraud upon the creditors of the vendee."

The tendency of our State is to prevent secret arrangements which are liable to mislead creditors, and we have strict laws requiring the filing of chattel mortgages within a certain length of time; the filing of conditional sale contracts; the registering and licensing of commission merchants; and requiring that any contract of sale where there is a condition to be performed before vesting of title in the vendee must be recorded in the place where the vendee resides, and that without such filing the transaction is voidable.

As in many cases which come up where dealings are had with persons of limited means and meagre credit, the transaction here has the appearance on its face of seeking to have the advantage of a sale, and at the same time retaining the security of a bailment. If claimant had contemplated at the time the agreement was entered into the return of the goods, it certainly would have put a provision to that effect in the contract, but we think it

clear that the only object of this agreement was to protect it in case of failure on the part of the vendees. As stated in the *Penny & Anderson* case, the transaction here did not create the relation of principal and factor, for the factor cannot make a profit of his agency nor a valid purchase for himself and receive a commission for his services. Neither can it be held to be a warehousing contract, for there was no real separation from other goods belonging to the bankrupts. Neither can it be held valid as a chattel mortgage, nor a conditional sale, on account of the failure of the claimant to file the same of record, and it cannot possibly be termed a bailment because it lacks the main element, to-wit: the agreement to return the goods at a specified time; nor is there any specific description of the property whatever.

The petitioner relies upon the case of *Berry Brothers vs. Snowden*, 209 Fed. 336, recently decided by this Court, but an examination of that case will disclose that the Court reached a conclusion upon facts essentially different from the facts in this case. In that case the Court held that the fact that the consignor agreed to and did pay the freight, cartage, storage and insurance on the goods was inconsistent with the passing of title, but the record in this case discloses that the consignee paid the insurance, taxes, freight, cartage, storage and all other expenses in connection with the handling of the goods.

We respectfully submit that the petition for re-

vision should be dismissed, or, if it is considered on its merits, that the order made by the district court should be affirmed.

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